

Iowa Department of Natural Resources
Environmental Protection Commission

ITEM

9

DECISION

TOPIC

Adopted and Filed – Chapter 135 – Technical Standards and Corrective Action Requirements for Owners and Operators of Underground Storage Tanks

ATTACHMENTS: **Rule Amendment to 567 IAC 135**
Iowa UST Fund Board and DNR 28E Agreement (signed).
Response Summary to Public Hearing Comments

The Department presents these rules for adoption and filing by the Commission. The Notice of Intended Action was published as ARC 7400B in the 12/3/08 issue of the Iowa Administrative Bulletin.

In summary, these rules replace some provisions adopted in June 2008 pertaining to assessment of risk to public water supply wells (PWSWs). An alternative approach to assessing risk to PWSWs was negotiated between the Department, and key stakeholders (UST Fund Board, Petroleum Marketers Management Insurance Company, and Water Supply organizations). The alternative approach is to implement a study on the impact of petroleum UST releases to PWSWs. The study is to be conducted jointly between DNR and UST Fund (via 28E Agreement -attached), and essentially replaces the requirement for owners and operators to complete a special PWSW assessment when the well falls outside the modeled or actual plume area (as adopted by rule in June). The new approach calls for rescinding those parts of rule related special PWSW assessment procedures (as presented herein). Because there may be cases where a LUST site may not be eligible for funding under the 28E agreement (should the study identify an unreasonable risk to a PWSW from a LUST site), a provision was also added to the rule (ITEM 2) that allows the Department to require owners / operators to take necessary assessment and corrective action measures to address risk in accordance with provisions of Chapter 135. To better explain the history behind the many rule changes, background information is provided following this summary (and as written in the November EPC Agenda Brief).

During the November 2008, the Commission approved the Notice of Intended Action with minor modification to Item 2 regarding when pathways need to be reevaluated. The Commission also approved the 28E Agreement that accompanies these rule amendments, with a suggested change in wording that the agreement be jointly administered by the DNR and UST Fund Board. The wording was changed and approved by the UST Fund Board at their December 11, 2008, meeting.

Because of the extensive number of stakeholder meetings held over the past year, only one public hearing was held after publication of the notice. Comments were heard from a representative of the Petroleum Marketers and Convenience Stores of Iowa (PMCI). Two concerns were brought forth: 1) the commenter believes the 28E agreement should have addressed prohibition of any additional PWSW installations (through the DNR's permitting process) when an existing PWSW was determined to be at an unreasonable risk from a UST petroleum release during the study; 2) the commenter is concerned that new paragraph 'e' will 'open the door' for the Department to ask for further assessment of pathways and receptors other than the PWSW receptor which was the sole focus of the rule changes. The Department has responded to these comments in the attached Public Hearing Response Summary.

These comments did not warrant changes to the rules presented for final adoption.

Wayne Gieselman
Administrator
Environmental Protection Division

February, 2009

Background

Approximately two years ago, the DNR and other interested stakeholders began a process to review a computer model used to predict the areal extent of plumes from leaking underground storage tanks. The model was 10 years old and in many cases largely overestimated the areal extent of plumes when compared to actual plumes that had been measured in our 10 years of working with the model. The DNR worked with the UST Fund, Dr. LaDon Jones from Iowa State University, groundwater professionals, and the private insurance sector to develop this model. In order to replace the "old" model with the new model which is more reflective of measured plumes, a rulemaking package was proposed.

This rulemaking package was proposed to the EPC in November of 2007. At that time, representatives of the public water supply sector expressed concern that the new model may not provide adequate protection of their source water areas. EPC directed staff to go back and work with water supplies and the other stakeholders to make sure their concerns were taken into account. In January of 2008, a revised rule package was proposed to the EPC which was sent out for public comment. At the March meeting of the Administrative Rules Review Committee (ARRC), the regulated community expressed opposition to parts of the rule dealing with special public water supply well assessment procedures, and subsequently the ARRC directed the DNR to undertake a regulatory analysis of the rules and continue conversations with the stakeholders. For the next two months, regular meetings were held and a regulatory analysis of the rules was completed. We met again with ARRC in May where we identified some changes that could be made to the rules, but that these changes needed to go back to the EPC for action.

In June, 2008 the Commission adopted a package of amendments to the "risk based corrective action" (RBCA) rules in chapter 567 IAC 135. These rules were to become effective on August 6, 2008. At its July meeting, the ARRC expressed concern about the rules for some of the same reasons expressed in March and exercised its authority to delay the effective date of the rules for 70 days. The Committee encouraged opposing stakeholders and the DNR to attempt to reach resolution. (See Iowa Code section 17A.4). The delay of the effective date was set to expire on October 16, 2008. At the October 14, 2008 ARRC meeting, after hearing that a consensus among stakeholders had been reached on an alternative approach to the special well assessment procedures, the DNR and stakeholders recommended and the Committee approved a session delay on those parts of the rule that were objectionable.

Alternative Resolution

1. The DNR and stakeholder groups have reached a tentative agreement to resolve the controversial aspects of the rule package.¹ The resolution requires a decision by the EPC to a) initiate further

¹ The non-controversial parts of the rule package related to the substitution of a "recalibrated" groundwater transport model for the existing model which was thought to be unnecessarily overpredictive, i.e. it assumed contamination in groundwater moved horizontally much further than it actually does. A technical advisory group had studied the groundwater model that was adopted in 1996 and modified it based on comparison to actual groundwater movement data accumulated over the past 10 years or more. The "recalibrated" model is expected to in some cases significantly reduce or shrink the predicted area of movement and thereby reduce the predicted impact on "receptors". The rule package also had some revisions to implement current practice of conducting "corrective action meetings" with responsible owners and operators, funding sources and other interested parties to jointly develop corrective action plans to address contaminated sites. It had some non-controversial provisions regarding notice to public water supplies when releases occur within 2,500 feet of their wells and also a requirement

rulemaking to essentially rescind selected parts of the adopted rules, and b) approve a funding agreement between the Iowa Comprehensive Petroleum Underground Storage Tank Board (UST Fund) and the DNR.

2. The controversial aspect of the rule package is a provision that establishes a special risk evaluation process for public water supply wells (pws) that are located outside of the predicted area of groundwater contamination as determined by a two-dimensional model. The provision assigns responsibility for the initial pws risk evaluation to owners and operators of LUST sites and their groundwater professional. Under pre-existing rules, UST owners and operators had no responsibility to assess any wells located outside the modeled or predicted area of groundwater migration. The concern from a technical point of view has been that the model does not take into account the pumping influence of wells and vertical movement of groundwater that could extend to wells outside the modeled plume and that the rules are simply ignoring potential risk to these critical resources.

3. Funding agencies and some of the regulated community felt that the rules placed an excessive and uncertain financial burden on them to assess risk to wells over a large area where there could be multiple contributing sources and that the assessment could result in excessive costs without sufficient documentation or justification that there was a need for this new procedure.

4. The DNR negotiated a resolution with representatives from the two primary stakeholder groups. One group is represented by the Petroleum Marketers Management Insurance Company (PMMIC) which insures about 70% of UST sites in Iowa and the UST Fund which is a state agency that provides financial assistance for "old" UST releases that essentially occurred prior to October 1990. Representatives of the Iowa Association of Municipal Utilities, the Iowa Rural Water Association, and the Iowa Association of Water Agencies have represented the other major stakeholder interests.

5. The DNR and these groups have prepared a proposal which would require the Commission to initiate a rulemaking to revise the adopted rules by removing the provisions that allocated responsibility for conducting a pws risk assessment to owners and operators and the DNR. That provision also granted authority to the DNR to require owners and operators to take further corrective action if sufficient proof of risk was established through this process. The negotiated proposal would provide that the DNR and the Iowa UST Fund enter into a 28E agreement in which the DNR and the UST Fund would jointly conduct a "study" of potential risk to pws that are located outside the modeled groundwater plume.

6. Under the basic terms of the 28E agreement (attached), the UST Fund would provide funding for no less than 125 sites to allow the DNR and the UST Fund to jointly study various types of risk assessment techniques, including "desktop" analyses, limited field work to determine the potential pumping influence of wells outside the modeled plume, recalibration of the existing two-dimensional model to more accurately identify risk to pumping wells and generally study the frequency and effects of impacts to wells outside the modeled plume. After the study is completed,

to sample all wells within 100 feet of an actual groundwater plume. With resolution of the pws risk assessment provisions, all parties appear to support maintenance of these adopted amendments.

and depending on the findings, the DNR would then have the option to initiate further rulemaking to propose a risk assessment procedure for wells located outside the modeled plume.

7. Under the terms of the 28E, if unacceptable risk to a pwsu is established, the UST Fund will provide funding to undertake further corrective action under two basic scenarios. One is where the DNR has classified the site as "no further action" (NFA) and issued a certificate but risk is subsequently established under this study such that the site must be "reopened". The other situation is where a NFA certificate has not been issued at the time a risk to a pwsu is established. In this case, the UST Fund would provide financial assistance under their existing remedial benefits program to claimants that are otherwise "fund eligible" (basically any sites with pre-1990 releases). But any site not fund eligible would not be granted funding to take necessary further action.

8. To address the concern that risk to a pwsu could be established under the study but funding for corrective action under this agreement may not be available in some cases, the DNR proposes an amendment to chapter 135 (per this notice) that would need to accompany the 28E agreement. The amendment gives the DNR discretion or "reservation authority" to require owners and operators to undertake further corrective action in the event that unacceptable risk to a pwsu is established during the study but funding under the 28E is insufficient or unavailable to undertake these actions. Without this provision, the 28E by its terms could identify a legitimate risk to a pwsu but provide no funding in certain cases. Without a rule amendment, the DNR may not have a legal basis to impose the regulatory obligations on the responsible owner since the well falls outside the modeled plume and under existing rules owners and operators may not have regulatory responsibility for wells outside the modeled plume. The stakeholders and the DNR are in consensus with the reservation language of the proposed rule.

ENVIRONMENTAL PROTECTION COMMISSION [567]

Adopted and Filed

Pursuant to the authority of Iowa Code section 455B.474, the Environmental Protection Commission has adopted amendments to Chapter 135, “Technical Standards and Corrective Action Requirements for Owners and Operators of Underground Storage Tanks,” Iowa Administrative Code.

The Commission adopted rules that were published in the July 2, 2008 Administrative Bulletin as ARC 6892B. The rules were scheduled to take effect on August 6, 2008. The rules contained some provisions which were relatively uncontroversial and some provisions that were controversial. The more controversial rules in part established a policy and procedure for the assessment of the potential risk of impact from underground storage tank (UST) petroleum releases to public water supply wells (PWSWs) which are located outside the actual or modeled contaminated groundwater plume. The rules established an assessment protocol in which owners and operators of USTs and the Department shared responsibility to initially conduct sufficient assessment of soil and groundwater contamination to determine the likelihood that a UST release could impact a PWSW. If sufficient evidence of potential or actual impact was established, the rules placed responsibility on the owner and operator to conduct further risk assessment and corrective action as necessary to protect human health and safety.

In response to public comment, some of which supported and some of which objected to the rules, the Administrative Rules Review Committee (ARRC) at a public meeting on July 8, 2008, imposed a 70-day delay on the entire rule making (ARC 6892B) pursuant to Iowa Code

section 17A.4(6). The ARRC requested that the primary stakeholders and Department staff attempt to reach a resolution of their differences. The 70-day delay, by law, expired October 16, 2008.

The Department and other stakeholders reached an agreement which generally provides for the Department and the Iowa Comprehensive Petroleum Underground Storage Tank Fund Board (UST Fund) to enter into an intergovernmental agreement (28E Agreement) to jointly develop and implement a study of the risk to PWSWs from UST petroleum releases. The study would be funded by public funds under the control of the UST Fund. The stakeholder agreement also required that the Commission agree to initiate a rule making to rescind those parts of the adopted rules in ARC 6892B which are controversial and relate to the PWSW risk assessment protocol and to amend Chapter 135 to clarify the responsibility of owners and operators to undertake further assessment and corrective action in the event the study confirms unacceptable risk to PWSWs. The stakeholders agreed not to object to the noncontroversial parts of the rule making published as ARC 6892B.

On October 14, 2008, the ARRC voted to impose a partial "session delay." (See the November 5, 2008, Iowa Administrative Bulletin.) In recognition of the stakeholder agreement, the ARRC imposed a session delay only on those more controversial portions of the adopted rules as published as ARC 6982B which dealt with the PWSW assessment protocol. The effect of the partial delay was that the prior 70-day delay on the remainder of the rule making expired October 16, 2008. The rules not subject to the session delay became effective October 17, 2008.

At a public meeting held on November 10, 2008, the Commission reviewed and approved the proposed stakeholder agreement, including the 28E Agreement and a Notice of Intended Action for these final adopted rules.

These adopted amendments rescind those parts of the rules adopted in ARC 6892B which establish the policy and procedure for conducting risk assessment to PWSWs outside the actual or modeled plume. The terms of the 28E Agreement are generally accepted as being sufficient to protect PWSWs during the study. The terms of the 28E Agreement explicitly acknowledge that, in the event sufficient proof of unreasonable risk to a PWSW is established during the study, the UST Fund would provide funding to take necessary corrective action under two basic circumstances: (1) When the UST site claimant is otherwise "fund eligible," assessment and corrective action to address risk to the PWSW would be treated as a fund-eligible cost; (2) When the Department has issued a no further action certificate (NFA certificate) prior to a determination of risk to the PWSW, the UST Fund shall agree to provide funding for corrective action pursuant to the authority granted in Iowa Code section 455G.9(1)"k." This provision generally provides that the Department and UST Fund enter into an agreement to provide a funding mechanism to address unreasonable risk which is discovered after issuance of an NFA certificate and which is not the result of a release which occurs after the release for which the NFA certificate has been issued.

Under the 28E Agreement, it is possible that the study could result in establishing sufficient proof of risk to a PWSW which is located outside the actual or modeled groundwater plume. In recognition of this fact, the EPC, with the support of the participating stakeholders, has adopted language to clarify the authority of the Commission, under 567—Chapter 135, to require the responsible UST owner and operator to undertake further assessment and corrective consistent with the risk-based corrective action rules 567—135.8(455B) through 567—135.12(455B) when the Tier 2 groundwater model is shown to be underpredictive.

Given the long period of public participation and the extensive stakeholder participation in the issues surrounding these amendments, the Department held one public hearing on January 6, 2009. One person provided comments on the NOIA preamble and amendments. The first was a suggestion to change the preamble to reflect that, if during the course of the PWSW study, an existing well or area is determined to be at risk from petroleum contamination, the Department take measures to prohibit the permitting of construction of wells in the vulnerable aquifer. While it is prudent to take such measures as suggested to prevent risk, this type of action is handled under a different rule, Chapter 43, not Chapter 135. The second concern was with the language of subrule 135.8(1), new paragraph 'e', ITEM 2. The concern was the department may take liberties in opening up other pathways and require evaluation of receptors other than PWSW wells which was understood to the commenter to be the focus of this new paragraph. Clarification was requested. The Department addressed concerns in a summary memo, but does not believe the comments warranted changes to the rule language or pre-amble.

The 28E Agreement between the Department and the UST Fund pertains to the expenditure of funds but not as a direct result of this rule making. The agencies have agreed to undertake a study of risks to PWSWs pursuant to their joint statutory authorities. Therefore, a fiscal impact statement in accordance with Iowa Code section 17A.4(3) and 25B.6 is deemed unnecessary.

These amendments are intended to implement Iowa Code section 455B.474.

The following amendments are adopted.

ITEM 1: Rescind the definition of “Sensitive area” in rule **567—135.2(455B)**.

ITEM 2. Adopt the following new paragraph **135.8(1)”e”**:

e. Pathway reevaluation. Prior to issuance of a no further action certificate in accordance with 135.12(10) and Iowa Code section 455B.474(1)”h”(3), if it is determined that the conditions for an individual pathway that has been classified as "no action required" no longer exist, or the site presents an unreasonable risk to a public water supply well, or the model used to obtain the pathway clearance underpredicts the actual contaminant plume, the individual pathway shall be further assessed consistent with the risk-based corrective action provisions in rules 567—135.8(455B) through 567—135.12(455B).

ITEM 3: Rescind and reserve paragraph **135.9(4)"f."**

ITEM 4: Amend paragraphs **135.10(4)"a"** and **"b"** as follows:

a. Pathway completeness. Unless cleared at Tier 1, this pathway is complete and must be evaluated under any of the following conditions: (1) the first encountered groundwater is a protected groundwater source; or (2) there is a drinking water well or a non–drinking water well within the modeled groundwater plume or the actual plume as provided in 135.10(2)”j” and 135.10(2)”k.” ~~A public water supply screening and risk assessment must be conducted in accordance with 135.10(4)”f” for this pathway.~~

b. Receptor evaluation. All drinking and non–drinking water wells located within 100 feet of the largest actual plume (defined to the appropriate target level for the receptor type) must be tested, at a minimum, for chemicals of concern as part of the receptor evaluation. Actual plumes refer to groundwater plumes for all chemicals of concern. Untreated or raw water must

be collected for analysis unless it is determined to be infeasible or impracticable. ~~The certified groundwater professional or the department may request additional sampling of drinking water wells and non-drinking water wells as part of its evaluation.~~

All existing drinking water wells and non-drinking water wells within the modeled plume or the actual plume as provided in paragraph “a” must be evaluated as actual receptors. Potential receptors only exist if the groundwater is a protected groundwater source. Potential receptor points of exposure are those points within the modeled plume or actual plume that exceed the potential point of exposure target level. The point(s) of compliance for actual receptor(s) is the receptor. The point(s) of compliance for potential receptor(s) is the potential receptor point of exposure as provided in 135.10(2) “j” and 135.10(2) “k.”

ITEM 5: Rescind and reserve paragraph **135.10(4)"f."**

ITEM 6. Rescind and reserve paragraph **135.10(11)“h.”**

Date

Richard A. Leopold, Director



Michael A. Mauro
Secretary of State
State of Iowa

28E Agreement

FOR OFFICE USE ONLY:

FILED
Iowa Secretary of State
M501955
12/30/2008 11:18:21 AM

PLEASE READ INSTRUCTIONS ON BACK BEFORE COMPLETING THIS FORM

Item 1. The full legal name, organization type and county of each participant to this agreement are:

	Full Legal Name	Organization Type	*County
Party 1	Iowa Comprehensive Petroleum UST Fund Board	State Agency	Polk
Party 2	Iowa Department of Natural Resources	State Agency	Polk
Party 3			
Party 4			
Party 5			

*Enter "Other" if
not in Iowa

Item 2. The type of Public Service included in this agreement is: 0 Unknown Service Type
(Enter only one Service Code and Description) Code Number Service Description

Item 3. The purpose of this agreement is: (please be specific)
The study of pumping well influence on petroleum contamination plumes

Item 4. The duration of this agreement is: (check one) ☒ Agreement Expires 12/16/2013 ☐ Indefinite Duration
[mm/dd/yyyy]

Item 5. Does this agreement amend or renew an existing agreement? (check one)

☒ NO

☐ YES Filing # of the agreement: _____

(Use the filing number of the most recent version filed for this agreement)

The filing number of the agreement may be found by searching the 28E database at: www.sos.state.ia.us/28E.

Item 6. Attach two copies of the agreement to this form if not filing online.

Item 7. The primary contact for further information regarding this agreement is: (optional)

LAST Name Scheidel FIRST Name Scott

Title Administrator Department Administrator

Email scott.scheidel@ars.aon.com Phone 5152259263

28E AGREEMENT
BETWEEN the IOWA COMPREHENSIVE PETROLEUM UNDERGROUND STORAGE
TANK FUND BOARD AND THE IOWA DEPARTMENT OF NATURAL RESOURCES
for THE STUDY OF PUMPING WELL INFLUENCE ON PETROLEUM
CONTAMINATION PLUMES

This Agreement is entered into by and between the Iowa Comprehensive Petroleum Underground Storage Tank Fund Board (hereinafter "Board"), with its Administrator's office located at 2700 Westown Parkway, Suite 320, W. Des Moines, Iowa 50266, and the Iowa Department of Natural Resources (hereinafter "DNR"), located at 502 E. 9th Street, Des Moines, IA 50319. This Agreement is entered into pursuant to Iowa Code chapter 28E and Iowa Code sections 455G.5 and 455G.6(15), and is effective as of the date it is fully executed by all parties.

I. PURPOSE

In 2006, the Software Investigation Committee (a committee including DNR staff and interested stakeholders) was formed to examine the risk based corrective action (RBCA) Tier 2 software used for evaluating potential risks from petroleum releases. The purpose of the Committee was to investigate the possibility of making the Tier 2 model more representative of actual risk posed by the existence of contamination at leaking underground storage tank (LUST) sites. The Committee concluded the model should be adjusted to provide a more realistic predicted plume size; however, the DNR has some concerns that an at-risk pumping well may not be identified because of the smaller projected plumes in the recalibrated Tier 2 model, and that a two-dimensional model and traditional two-dimensional sampling regime at LUST sites may not adequately characterize pumping influences of the well on contaminant plume movement or vertical migration.

The purpose of this Agreement is to establish the terms and conditions under which the Board will provide funding to the DNR to evaluate the risk posed by UST petroleum contamination to public water supply wells that are located outside the actual or modeled groundwater plume and which may otherwise have been classified no action required with a Tier 1 or Tier 2 risk assessment. The study will incorporate and evaluate the criteria in ITEM 5 of ARC 6892B as published in the July 2, 2008 edition of the Iowa Administrative Bulletin.

At a minimum the study will screen no less than 125 new, current or historical LUST sites. The results of the study will be used to modify RBCA rules to ensure adequate protective screening is in place to identify and address any unreasonable risk to human health through public water supplies. The intent in the broadest sense, is to provide for continued calibration of the Tier 2 model to ensure it is an appropriate screening tools for risk posed to relevant receptors.

The parties mutually agree that nothing contained in this agreement is intended to limit,

modify, change, expand, restrict, rescind or otherwise alter the statutory or regulatory authority, duties or responsibilities of either party.

II. TERM

Unless otherwise terminated in accordance with the terms of this Agreement, the Agreement shall be in effect for five years from its effective date, or the completion of the study. Upon completion of the study, should results indicate a change in Chapter 567 IAC 135 (RBCA) rules is warranted, the term and conditions specified in the agreement regarding well assessment and funding shall be extended to sufficiently be protective of wells during the period under which rules changes are made and finalized.

III. ADMINISTRATION

This Agreement shall be jointly administered by the Board and its Administrator and the Director of the DNR or the Director's designee. All administrative decisions concerning this Agreement shall be undertaken pursuant to the terms outlined herein.

IV. RESPONSIBILITIES

The DNR and the Board shall retain all powers and duties conferred by their respective enabling acts, but shall assist each other in the exercise of these powers and the performance of these duties in the following manner:

A. DNR RESPONSIBILITIES

1. Provide regulatory oversight of sites using the calibrated Tier 2 model.
2. Identify sites that warrant additional study, beyond the required Tier 1 or Tier 2 risk assessment, for which the department believes the public water supply well may potentially be at risk. The DNR may use any criteria for selection of these sites.
3. Jointly develop scope of work for the additional study to be completed consistent with Item 5 in ARC 6892B as published July 2, 2008 in the Iowa Administrative Bulletin.
4. Jointly review and evaluate proposals in the selection of qualified professionals to perform the requested scope(s) of work.
5. Consolidate and track results of studies as they are completed.
6. If the results of the study of public water supply wells located outside the actual or modeled groundwater plumes indicate that additional assessment procedures are required to adequately protect public drinking water

supplies, the DNR shall promulgate rules to outline those procedures.

7. Assist the Board in securing any grants or funding to offset the costs associated with this agreement.

B. BOARD RESPONSIBILITIES

1. Provide funding for study at sites that DNR identifies for additional study with regard to pumping wells located outside the identified Tier 1 search radius or Tier 2 actual or modeled plume.
2. Jointly develop scope of work for the additional study to be completed consistent with Item 5 in ARC 6892B as published July 2, 2008 in the Iowa Administrative Bulletin.
3. Jointly review and evaluate proposals in the selection of qualified professionals to perform the requested scope(s) of work.
4. Assist DNR with the evaluation of data obtained as studies are completed under this agreement.
5. Provide for the completion of work or direct funding through any applicable agreements or sources to address risk associated with specific sites for which a No Further Action certificate is issued during the term of this agreement that are proven through the study under this agreement to be likely to impact a public water supply well not identified in the calibrated Tier 2 model receptor ID plume.
6. Provide benefits to otherwise Fund eligible sites identified in the study that the DNR determines and reasonably demonstrates pose an unreasonable risk to public water supplies consistent with Iowa Code Section 455B.474 despite meeting the No Action Required standard in the calibrated model in IAC 567 Chapter 135 but for which a No Further Action certificate has not been issued.
7. Provide for corrective action at sites under any agreement pursuant to 455G.9(1)(k) at sites that have been issued a No Further Action certificate but for which the risk evaluation under this Agreement demonstrates that the site poses an unreasonable risk to a public water supply not identified by the calibrated model.
8. If the results of the study of public water supply wells located outside the actual or modeled groundwater plumes indicate that additional assessment procedures are required to adequately protect public drinking water supplies, creating a DNR responsibility to promulgate rules to outline those procedures, the Board shall continue providing funding under items 6 and 7 of this section beyond the term of this agreement and at least until the aforementioned rules are adopted.

V. FINANCING

The Board shall pay all costs associated with the administration of this Agreement in accordance with the terms of this Agreement. The DNR shall pay all costs associated with DNR personnel.

VI. AMENDMENT

This Agreement may be amended from time to time by written agreement of the Parties. All amendments shall be in writing, signed by both Parties, and filed with the Secretary of State and recorded with the Polk County Recorder.

VII. TERMINATION

A. Termination Upon Mutual Consent. This Agreement may be terminated upon the mutual written consent of the parties.

B. Termination By One Party. Notwithstanding anything in this Agreement to the contrary, and subject to the limitations, conditions, and procedures set forth below, either party to this Agreement shall have the right to terminate this Agreement without penalty by giving sixty (60) days' written notice to the other party to the Agreement as a result of any of the following:

1. There are insufficient funds or resources available to allow a party to fulfill its obligations under this Agreement;
2. A change in the law prevents or substantially impairs a party's ability to participate in this Agreement; or
3. Failure to perform responsibilities described in this Section IV of this Agreement at a quality or quantity that can be reasonably expected by the other party.

VIII. NOTICES

Whenever notices and correspondence are to be given under this Agreement, the notices shall be given by personal delivery to the other party, or sent by mail, postage prepaid, to the other party as follows:

To the Board

Iowa UST Fund Board
2700 Westown Parkway, Suite 320,
W. Des Moines, Iowa 50266

To the DNR

Iowa Department of Natural Resources
UST Section
502 E. 9th Street
Des Moines, IA 50319

IX. APPLICABLE LAW

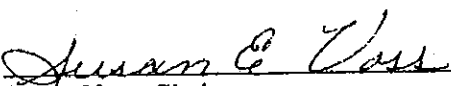
This Agreement is to be governed by the laws of the State of Iowa.

X. FILING AND RECORDING

It is agreed the Board will electronically file this Agreement with the Secretary of State, and electronically file any amendment, modification, or notice of termination of this Agreement within thirty days as provided in Iowa Code section 28E.8 (2007).

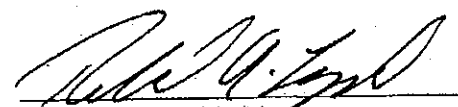
IN WITNESS WHEREOF, and in consideration of the mutual covenants set forth herein and for other good and valuable consideration, the receipt, adequacy, and legal sufficiency of which are hereby acknowledged, the parties have entered into this 28E Agreement and have caused their duly authorized representatives to execute this 28E Agreement.

**IOWA COMPREHENSIVE PETROLEUM
UNDERGROUND STORAGE TANK
FUND BOARD**

BY: 
Susan Voss, Chair

DATE: 12/11/08

**IOWA DEPARTMENT OF NATURAL
RESOURCES**

BY: 
Richard Leopold, Director

DATE: 12-16-08



STATE OF IOWA

CHESTER J. CULVER, GOVERNOR
PATTY JUDGE, LT. GOVERNOR

DEPARTMENT OF NATURAL RESOURCES
RICHARD A. LEOPOLD, DIRECTOR

Underground Storage Tank Section

Public Hearing Response Summary
Notice of Intended Action, ARC 7400B, IAB 12/13/08

Proposed amendments to 567--Chapter 135 IAC:

- Rescinds provisions related to special procedures for assessing public water supply wells.
- Adds a provision that requires the risk from a petroleum release be re-evaluated when the conditions under which a pathway was classified "no action required" no longer exist, or it is determined the site presents an unreasonable risk to a public water supply well, or the model is found to be under predictive.

No written comments on these rule amendments were received from the public. A public hearing was held on January 6, 2009. Six people attended the meeting. Comments were given by Jeff Hove representing the Petroleum Marketers and Convenience Stores of Iowa (PMCI).

General Summary of Comments:

Mr. Hove commented on the preamble to these rules which describe a 28E agreement between the Department of Natural Resources (DNR) and the Iowa Comprehensive Petroleum UST Fund Board (UST Fund) for studying the risk to public water supply wells (PWSW) from petroleum contamination. Mr. Hove expressed his understanding that should the study show a PWSW located outside the modeled contaminant plume is found to be at risk, that the Department would take measures to also prohibit the permitting & construction of any additional PWSWs in the area deemed to be at risk due to the UST petroleum release. He indicated this point was made at stakeholder meetings, but didn't see the matter expressly discussed in this preamble nor in the 28E agreement.

Response: The idea of prohibiting wells from being installed in an area considered to be at risk or likely to become contaminated by petroleum contamination may have been brought up early on in the stakeholder process; however, it was not part of the final negotiations and decision to accept this alternative approach for examining risk to PWSWs. Further, the regulations regarding well permitting (or denial, thereof) are not part of Chapter 135, but rather addressed under Chapter 43.3 (public water supply system construction). Currently, provision 43.3(7) "b"(5) provides that wells may not be permitted in areas of projected plumes (e.g., areas of "any known anthropogenic groundwater contamination").

The DNR agrees it prudent not to create additional risk by permitting wells in vulnerable areas; The UST Section will work closely with DNR's Water Supply Engineering Section and Water Supply Operation Section to ensure protection of water supplies, either by finding alternative locations for wells or implementing appropriate design, construction, and drilling standards. Equally, a community has the right to a safe and sustainable water source. As such, other options for preventing risk to water supplies may also be necessary to preserve that resource (e.g., cleanup or reduction of the sources of contamination). These decisions will be case specific.

Mr. Hove also made comments specific to Item 2, an amendment to subrule 135.8(1).

ITEM 2. Amend subrule 135.8(1) by adopting new paragraph "e" as follows:

e. Pathway re-evaluation. Prior to issuance of a no further action certificate in accordance with 135.12(10) and Iowa Code section 455B.474(1)(h)(3), if it is determined that the conditions for an individual pathway that has been classified as "no action required" no longer exist, or it is determined that the site presents an unreasonable risk to a public water supply well or the model used to obtain the pathway clearance under predicts the actual contaminant plume, the individual pathway shall be further assessed consistent with the risk-based corrective action provisions in 567--135.8(455B) through 567—135.12(455B).

Mr. Hove indicated the entire focus of the stakeholder meetings was to determine how to assess risk to public water supply wells – that other pathways were not under consideration. Further, he understood the Department accepted the new model as adequate to assess risk to other pathways and receptor types. He is concerned that new paragraph “e” opens up the potential for the DNR to require assessment of other pathways under the identified circumstances, regardless of what the model indicates is at risk.

Response: The DNR agrees the focus of the stakeholder meetings was to examine alternative ways for assessing risks to PWSWs located outside the modeled plume in light of use of a new model that has less of a ‘buffer’ zone than the previous model. Paragraph ‘e’ was born out of discussions related to the PWSW risk study and funding of corrective action should a LUST site be creating a risk to a PWSW (and in replacement of the former special well assessment procedures). Specifically, funding mechanisms are in place to cover corrective action at LUST sites when a PWSW is found to be at risk, but only for certain eligible sites and eligible conditions (see PWSW Study 28E, and 28E for funding assessment/corrective action for NFA sites that need to be reopened). There are some sites that will not be covered under either of these 28Es. Paragraph ‘e’ was added to the rule to give the Department authority to require responsible parties to address unreasonable risks to public water supply wells.

Discussions at the stakeholder meetings focused on the limitations of a two-dimensional model, as well as limitations of plume definition based on sampling strategies currently in use. Should the study indicate the model is inadequate, paragraph ‘e’ would be in place to direct necessary corrective actions to protect public safety, health and the environment.

It is not the Department’s intention nor practice to capriciously open other pathways to evaluate risk when the model and site conditions reflect there is not likely a risk. The RBCA process and groundwater transport model are the framework and methodology by which receptors are assessed for risk (per 567--135.8(455B) through 567—135.12(455B)). We intend to continue using this process. However, should conditions change or new risks be identified, the Department has a duty to respond. This is not different from how the rules are applied currently.

We appreciate public participation and acknowledge the comments received. The comments heard at the public hearing held January 6, 2009, have merit; but the Department’s position is they do not warrant a substantive change to the rule language.

Copies of the transcribed public hearing notes are available upon request.

1/23/09

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